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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 514

THOMAS HENRY ROBINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1571) is reported at 144 F. (2d) 392.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 31, 1944 (R. 1569), and a petition for rehearing (R. 1573) was denied August 28, 1944 (R. 1574). The petition for a writ of certiorari was filed September 27, 1944, and was denied December 18, 1944. On January 15, 1945, a petition for rehearing was granted, the

order denying certiorari was vacated, and the writ of certiorari, limited as hereinafter indicated, was granted. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The order granting certiorari limits review "to the question presented under Point No. 1 of the petition for rehearing and under Question 5 (d) of the petition for certiorari."

Point No. 1 of the petition for rehearing (p. 3) is headed thus:

> Injuries inflicted must be permanent and be in evidence at time court imposes sentence, else death penalty may not be inflicted.

Question 5 (d) of the petition for certiorari (p. 25) reads:

> Whether the death penalty was intended to be inflicted regardless of the time when inflicted or the degree of injury inflicted.

In the light of petitioner's contentions we conceive the questions presented for review to be:

1. Whether the words "liberated unharmed" in the proviso of Section 1 of the Federal Kidnaping Act limiting the application of the death penalty refer to the condition of the kidnaped person at the time of his release or at the time of trial and

imposition of sentence, where the release occurs prior to the trial.

2. Whether the word "unharmed" as used in the proviso requires as a condition to the imposition of the death penalty that the injury to the kidnaped person be permanent.

STATUTE INVOLVED

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides in pertinent part as follows:

> SEC. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, * * *.

STATEMENT

On October 20, 1934, petitioner, his wife, and father were indicted (R. 1–5) in the District Court of the United States for the Western District of Kentucky in two counts, the first charging

a conspiracy to violate Section 1 of the Federal Kidnaping Act (R. 1–3), in violation of Section 3 of that Act, and the second charging the substantive offense (R. 4–5). The second count alleged, in substance, that petitioner and his codefendants unlawfully transported in interstate commerce one Alice Stoll who had been kidnaped and held for ransom, and did not liberate her unharmed (R. 4). Prior to petitioner's trial, petitioner's wife and father were tried and acquitted on both counts. The conspiracy count was accordingly dismissed (R. 177). Petitioner, then a fugitive from justice, was apprehended on May 11, 1936, at Glendale, California, returned to Louisville, Kentucky, on May 12, 1936, and arraigned the following day (R. 859, 865, 873–875, 988, 1321). Petitioner entered a plea of guilty to the kidnaping charge and was sentenced to life imprisonment (see *Robinson* v. *Johnston,* 118 F. (2d) 998 (C. C. A. 9)). In August 1943, as a result of habeas corpus proceedings instituted by petitioner, that sentence was invalidated on the ground that he had been denied the assistance of counsel at the time he entered his plea of guilty, and he was remanded to the District Court for the Western District of Kentucky for further proceedings (50 F. Supp. 774 (N. D. Cal.)).[1]

[1] The hearing in the habeas corpus proceeding followed upon this Court's remand of the cause to the Circuit Court of Appeals for the Ninth Circuit (*Robinson* v. *Johnston*, 316 U. S. 649) and that court's remand of the case to the district court for hearing (130 F. (2d) 202).

Two attorneys were appointed for petitioner, and, upon arraignment on October 13, 1943, he entered a plea of not guilty (R. 173–174, 217). At the trial, which began on November 29, 1943, there was evidence to the effect that when petitioner entered Mrs. Stoll's home in Louisville, Kentucky, with the announced intention of kidnapping her (R. 520, 553, 554, 606, 612–613), she resisted him, and that in subduing her petitioner twice struck her on the head with an iron pipe causing her to bleed profusely and to collapse in a dazed state upon a bed (R. 521–522, 556–557, 606–608, 610, 611; see also R. 596–597, 633–634, 654, 673, 676, 680). He then forced Mrs. Stoll's maid to bind Mrs. Stoll's wrists with wire which he produced from his pocket (R. 522, 555, 606–608) and himself placed adhesive tape over her mouth (R 523, 606–608). After binding the maid (R. 522, 609) and leaving a ransom note which he had previously prepared (R. 609, 656–661, 678, 922, 925, 961; Gov. Ex. 33, R. 598), petitioner forced Mrs. Stoll at the point of his gun to accompany him to his car, ordered her to lie down on the floor in the rear, bound her feet, and covered her completely with a blanket and newspapers (R. 522–524, 555, 560, 609). Petitioner then drove to Indianapolis, Indiana (R. 525). Upon arrival there he drove into a dark garage, where he got out of the car, stating to Mrs. Stoll, who was still bound and gagged, that he was going to see whether "the coast was clear"

and that if she made any attempt to scream or attract attention, he would "bump her off" (R. 525–526). He returned to the car in about five minutes, stated that the "coast was not clear," and drove the car to a deserted neighborhood (R. 526). There he unbound Mrs. Stoll's feet, directed her to sit next to him on the front seat (R. 526, 561), and then removed the tape from her mouth. Her head was still bleeding. At her request, he unbound her wrists, which were causing her great pain. (R. 526, 527, 561.) Mrs. Stoll, who had not seen the ransom note or the envelope in which it was contained (R. 546, 555), asked petitioner why he had kidnapped her. He replied, "For the money." (R. 527.) Petitioner then drove back to the garage where they had been previously and, upon arrival, asked Mrs. Stoll whether he would have to carry her or whether she would walk (R. 527). Mrs. Stoll agreed to walk, and they entered through the rear door of the apartment which petitioner had previously rented under the name of Kennedy (R. 527–528, 699–705, 921, 928). That night Mrs. Stoll, who was very weak and ill, and whose head was "going around" and bleeding, asked petitioner to apply mercurochrome to the cut. He complied with this request but gave her wound no other attention. (R. 529, 563.)

Petitioner held Mrs. Stoll in this apartment from October 10 to 16, 1934 (R. 525–540, 699–705, 928–929). During that period he required her to sleep in one of the twin beds in the bedroom while he slept in the other. Each night he tied her hands to the bedsprings and attached a cord from her wrist to his so that he would be warned of any movement by her (R. 528, 529, 563, 704). During the entire time, petitioner kept all the window shades drawn (R. 536, 570, 571, 576, 702, 723, 930). Several times a day, when he had occasion to leave the apartment to purchase food or for other reasons, petitioner would place a chair in the closet, securely tie Mrs. Stoll to it, gag her, place adhesive tape over her mouth, and lock the door (R. 530–531, 565, 581, 941). When Mrs. Stoll used the bathroom, she was permitted to close, but not lock, the door, and petitioner sat in the living room opposite the door holding a pistol in his hand (R. 566–567, 569, 572, 576; cf. R. 930).

At the time of her release, on October 16, 1934, Mrs. Stoll still bore on her head the cut which was surrounded by clotted blood. There was also a rounded swelling about 1½ inches in diameter which was of a character to indicate a possibility that "the actual integrity of the bone had been interrupted." These injuries were caused by the blows inflicted with the iron pipe. Her lips were

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raw and bleeding as a result of the application of the adhesive tape and she was in a state of general nervous tension and exhaustion. R. 545, 590–592, 636, 637, 662, 1043.)[2]

Mrs. Stoll testified on behalf of the Government at the trial nine years after her release (R. 518).

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[2] Dr. Harry S. Frazier, who examined Mrs. Stoll on the evening of the day she was liberated, testified as follows (R. 590–591):

"A. Mrs. Stoll was utterly worn out, she was pale, bedraggled, had circles under her eyes, she had sores across her lips with some remnant of the dirt that adhesive plaster will leave at its margins, her blood pressure was 148 over 90, and her pulse was rapid, 96.

Q. Stop there and explain to the jury what that blood pressure rate means.

A. Well, that simply means that, though outwardly calm, she was under a terriffic nervous tension and that was its reaction, just to boost up her blood pressure and accelerate her pulse rate. She was not trembling, she had no difficulty in expressing herself, but she did have, first, a rounded swelling on her right temple which was an inch and a half in diameter. It began just under her hair line and covered pretty much the entire temple. This place was not discolored as the usual bruise is, but was quite tender to touch and quite hard, and I felt that that represented bleeding under the skin that covers the bone, the periosteum, and the mere fact that it did not discolor and was so long absorbing, going down, made me believe that perhaps there the actual integrity of the bone had been interrupted. The other injury was on the back of her head a little above and behind the ear, and that was covered up by a clot of blood which had matted the hair also, and some red stuff was also on it which Mrs. Stoll said was mercurochrome.

Mr. HOGAN. That's objected to.

The COURT. Objection sustained to what Mrs. Stoll said. The jury will not consider that part of the testimony.

A. (Continuing.) This cut in the scalp was an inch long. It was partially healed. The edges were remarkable to say,

There was no testimony as to her physical condition at the time of the trial.

In his instructions to the jury the trial judge stated (R. 1517–1518):

> Also keep in mind that you cannot recommend punishment by death if the kidnaped person has been heretofore liberated unharmed. The kidnaped person in this case was Mrs. Alice Speed Stoll. She has been heretofore liberated by the kidnaper and returned to her home. But this still leaves for your decision whether or not she was liberated unharmed. In considering and deciding this issue of fact, I instruct you that the statute, reasonably interpreted in the light of its purpose, refers to the condition of the kidnaped person at the time of her release. It bars the death penalty and also any recommendation by the jury to that effect if the kidnaper has released the kidnaped person unharmed, even though the kidnaped person may have received injuries during captivity from which she had recovered at the time she was liberated.

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in apposition, that is, they were together. It was the sort of cut that should have had at least two stitches taken in it to be sure of good results, but, fortunately, the wound had not gaped and healing was in process. All that was necessary to do was to clean off the blood with soap and water and peroxide, and then I covered that with flexible collodion, the old fashioned new skin."

> Accordingly, if your verdict is one of guilty, and upon consideration of the question of whether or not any recommendation of punishment by death shall be made to the court, it is necessary for you to first decide whether or not Mrs. Alice Stoll was liberated by the kidnaper unharmed. The word unharmed will be given by you its usual and ordinary meaning attributed to it in the ordinary use of the English language. It means not harmed by the kidnaper during the commission of the offense or while in the custody of the kidnaper prior to liberation by him. The usual and ordinary meaning of the word harmed is hurt, or injured, or damaged. If you find that Mrs. Alice Stoll was liberated unharmed by the kidnaper, you cannot recommend punishment by death even though your verdict is one of guilty. If on the contrary you find that Mrs. Alice Stoll was not liberated by the kidnaper unharmed, you then give further consideration to whether or not in your judgment and discretion you decide to recommend punishment by death in accordance with the instructions hereinbefore given to you.
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> * * * * *

So far as appears from the record no exception was taken to the charge (R. 1518) but petitioner's assignment of errors below indicates that the trial judge rejected a request for an instruction that the jury could not recommend the death

penalty because there was no evidence in respect of Mrs. Stoll's physical condition at the time of trial (R. 166).[3]

On December 11, 1943, the jury returned a verdict of guilty with a recommendation of the death penalty (R. 59, 1519), and on December 13, 1943, the trial judge sentenced petitioner to death by electrocution (R. 66–67, 1548). Upon appeal to the United States Circuit Court of Appeals for the Sixth Circuit the conviction was affirmed (R. 1569, 1571).

SUMMARY OF ARGUMENT

1. The interpretation of the proviso here involved must be determined from the face of the statute itself since neither the legislative history nor prior state legislation offers guidance. We think that, as held in *United States* v. *Parker,* 19 F. Supp. 450, 456 (D. N. J.), affirmed, 103 F. (2d) 857, 861 (C. C. A. 3), certiorari denied, 307 U. S. 642, where there has been a release the condition of the victim at the time of his release determines the applicability of the death sentence. Of course if there has been no liberation the death sentence may in any event be imposed on recommendation of the jury. The grammatical construction of the Kidnaping Act and its evident purpose exclude petitioner's construction that the death

[3] The question was also again raised by counsel for petitioner in argument upon a motion for a new trial (R. 1523–1524, 1526–1530).

penalty may not apply if the victim has recovered from his injuries at the time of trial and sentence.

2. There is no warrant for petitioner's construction that a victim who has suffered no permanent injury is an unharmed victim within the meaning of the statute. Harm is a word in common usage with a well-defined meaning of "hurt" or "injury." Here the evidence established that Mrs. Stoll was twice beaten over the head with an iron pipe and that she was still suffering from these injuries when she was released six days later, that in addition her lips were raw and bleeding, and that she was in a state of nervous tension and exhaustion. The injuries inflicted upon Mrs. Stoll were obviously not trivial. Clearly at the time of her release she was not in an unharmed condition.

ARGUMENT

I

THE LIMITATION OF THE PROVISO UPON THE APPLICATION OF THE DEATH PENALTY RELATES TO THE CONDITION OF THE KIDNAPED PERSON AT THE TIME OF HIS RELEASE

Section 1 of the Federal Kidnaping Act provides for the death sentence upon recommendation of the jury, but further provides that—

> the sentence of death shall not be imposed by the court if, prior to its imposition the kidnaped person has been liberated unharmed.

Petitioner contends (Br. 2–13) that under the terms of this proviso the harm to the kidnaped person must subsist at the time of the trial and imposition of sentence even though the victim was released prior to the trial and was then suffering from injuries inflicted by the kidnaper. It is the Government's position that the term "liberated unharmed" refers to the condition of the victim when liberated, provided, of course, that the release occurs before the imposition of sentence.

a. The legislative history of the statute sheds no direct light on the interpretation of the proviso. As originally enacted in 1932 (47 Stat. 326), the Kidnaping Act contained no provision for the death penalty. The House Judiciary Committee had reported favorably a bill which, lacking a proviso such as that now contained in the statute, made the death penalty mandatory unless the jury recommended mercy (see H. Rep. No. 1493, 72nd Cong., 1st Sess.), but in the debate on the question whether to substitute the House bill for that passed by the Senate, which contained no provision for the death penalty (75 Cong. Rec. 13282–13304), considerable opposition to the death penalty was expressed by some members of the House (75 Cong. Rec. 13284–13285, 13288, 13289, 13290, 13294–13297).[4] Due to the

[4] One of the bases of objection to the death penalty was that voiced by Congressman Celler (75 Cong. Rec. 13285):

"If you insist upon the death penalty, I wager that you will inflict a penalty on the victim who is kidnaped. The victim

desire for prompt action, the session nearing its end, the bill was passed in the form proposed by the Senate (75 Cong. Rec. 13299, 13303–13304).

However, in 1934, when the Department of Justice suggested several amendments to the Kidnaping Act, none of which are relevant here, the House Judiciary Committee recommended additional changes, including the authorization of the death penalty with the proviso here involved (H. Rep. No. 1457, 73rd Cong., 2nd sess.). The House report on the bill merely paraphrased the language of the proviso, stating that the jury was to be permitted to designate the death penalty but that the penalty was not to be imposed "if the kidnaped person has been liberated unharmed prior to the imposition by the court of the sentence." This particular transposition of the language of the proviso, however, does not, as petitioner contends (Br. 4, 8), change the meaning of the proviso or aid in its construction. There were no hearings in connection with the amendments and no debate on the proviso. After a conference the proposed amendments were accepted, together with other conference reports, by both houses without debate (H. Rep. 1595, 73rd Cong., 2d sess.; 78 Cong. Rec. 8775, 8778, 8855–8857).

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may be murdered or slain because the prisoner has nothing to gain by the victim being kept alive, because he forfeits his own life, in any event. He may destroy the life of the very person who is kidnaped and whom you are trying to save. The person kidnaped is the witness who, even when rescued, can always point the accusing finger at the guilty. Doing away with victim would save the life of the guilty. * * *"

The concept of making the degree of punishment depend upon whether the kidnaped person suffered injury had been embodied in a few state statutes passed in 1933 following the kidnaping of the Lindbergh child, but the phraseology of such statutes differed from that subsequently embodied in the federal statute. One state merely distinguished between a live victim and a dead one,[5] whereas others provided for a more stringent penalty if the kidnaped person suffered "bodily harm"[6] or "serious bodily harm."[7] The federal proviso was not precisely patterned on prior state legislation.[8]

b. The words "liberated unharmed" in the context of the proviso are subject to two interpretations. They may be construed to mean liberated

[5] New York Laws of 1933 (Extraordinary Sess.), Ch. 773, p. 1586.

[6] California Statutes and Amendments (1933), Ch. 1025, p. 2617; *People* v. *Tanner*, 3 Cal. (2d) 279, 44 P. (2d) 324.

[7] West Virginia Acts (1933), Ch. 70, pp. 188, 189. Prior to 1933, Texas provided for a lesser degree of punishment where the kidnaped person was released "without serious bodily injury" (Texas Laws, 1931, Ch. 12, p. 12); and Wisconsin provided for a lesser degree of punishment if a kidnaped child suffered "no permanent injury" (Wis. Stats. (1929), sec. 340.56).

[8] Since the adoption of the proviso in the Federal Kidnaping Act in 1934, six states have incorporated the words "liberated unharmed" in their kidnaping statutes (Idaho Code Anno. (1940 Supp.), sec. 17–1304; Louisiana Code of Criminal Law (Dart, 1943), sec. 740–44; New Mexico Stat. Anno. (1941), sec. 41–2503; Ohio General Code (1937), sec. 12427; Oregon Comp. Laws Anno. (1940), sec. 23:435; Wyoming Comp. Stat. (1940 Supp.), sec. 32:214A). We have found no state decisions interpreting those words.

without having been harmed at any time in the course of detention, or they may be construed to mean liberated in an unharmed condition at the time of liberation. The first construction attributes to Congress the intention to cause kidnapers not to harm the victim but without tending to secure liberation of a victim who has been harmed. The second construction offers the kidnaper an inducement, in addition to the inducement not to harm, to care for and to cure an injured victim so that he may be unharmed when liberated. The second construction encourages kidnapers not to murder an injured victim, an inducement not present under the first construction. In view of the temptation to kidnapers to murder their victims in order to dispose of witnesses to their crime, and in view of the interest disclosed in Congress to avoid a death penalty provision which would encourage this result, the Government submits that the second construction more properly reflects the intention of Congress and should be adopted.

Even if the first construction were held to state the legislative intent more correctly than the second construction, believed by the Government to be correct, it is submitted that in any event there is no support either in the words of the proviso or the intention of Congress for the third construction contended for by the petitioner to the effect that the condition of the victim at the time of the imposition of sentence

controls. Moreover, even if the first construction were adopted this case on its facts was correctly submitted to the jury because the charge required the jury to find not only that the victim had been harmed, which would have satisfied the first construction of the statute, but also that she was not cured and unharmed at the time of her liberation (R. 1517–1518). The petitioner cannot complain that the charge was more favorable to him than would have been required under the first construction of the proviso.

The only case construing the proviso on this question has adopted the construction urged by the Government. *United States* v. *Parker,* 19 F. Supp. 450, 456 (D. N. J.), affirmed 103 F. (2d) 857, 861 (C. C. A. 3), certiorari denied, 307 U. S. 642.[9] The District Court stated that the harm may relate to the period of captivity or to the moment of liberation depending on whether it was the legislative intention to induce kidnapers not to harm the victim or to produce a cured and live victim and that Congress should be credited with

[9] In the *Parker* case the indictment alleged that the victim had been beaten and tortured but was silent on his condition at the time of liberation although the proof subsequently disclosed that he was recovered and unharmed at that time. The defendants contended that this charged a crime punishable by death triable only in the county where committed under the venue statute applicable to capital offenses (28 U. S. C. 101). District Judge Clark, however, denied the motion for a change of venue on the ground that the death penalty was not applicable because the indictment did not allege that the injured victim was suffering harm at the time of liberation.

intending the second inducement. The Circuit Court of Appeals stated its agreement with the court below that the proviso refers to the condition of the kidnaped person at the time of his release even though he may have received injuries during his captivity from which he has recovered and that any other construction would encourage the murder of an injured victim by the kidnapers and is not to be attributed to Congress.[10]

The reference in District Judge Clark's opinion to "kidnappers who, at the time of the imposition of sentence, are unable to produce an unharmed victim" and the inducement to kidnapers "to refrain from action leading either to permanent injury, to permanent captivity, or to death" (19 F. Supp. at 456) do not, when read in their

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[10] The Circuit Court of Appeals stated (103 F. (2d) at 861):

"* * * We agree with the court below that the act, reasonably interpreted in the light of its purpose, refers to the condition of the kidnapped person at the time of his release. It bans the death penalty if the kidnappers release him sound and unharmed even though he may have received injuries during his captivity from which he has recovered. Any other construction would, it seems to us, tend to encourage the murder of the victim by the kidnappers if in the course of the kidnapping he had been injured. Congress must have preferred, as the court below aptly said (19 F. Supp. 450, 456), 'a cured and live victim to a dead or permanently injured one, even if the kidnappers must refrain from liberating until the cure is accomplished.'"

context, support the petitioner's construction.[11] Both the District Court and the Circuit Court of Appeals in the *Parker* case adopted the view that the victim's condition at the time of liberation controls.

c. The construction of the statute for which petitioner contends would, in its practical effect, lead to strange results. Thus, a kidnaped person might be released with a very serious concussion of the brain requiring a long period of treatment from which he eventually recovered completely. If the kidnaper were apprehended and tried immediately, the death penalty would clearly be applicable. If, however, for some reason his original conviction were reversed or set aside on

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[11] Judge Clark stated (19 F. Supp. at 456):

"* * * The harm may relate to the period of captivity and it may relate to the moment of release or liberation—or, in other words, Congress may mean to punish with death (the jury concurring) kidnappers who have harmed their victim at any time—or, on the other hand, Congress may mean to punish with death (the jury concurring) kidnappers who, at the time of the imposition of sentence, are unable to produce an unharmed victim. Either interpretation indicates a legislative intention to offer negative inducements to kidnappers. The first inducement is to conduct the kidnapping with, shall we say, the minimum of violence. The second inducement is to refrain from action leading either to permanent injury, to permanent captivity, or to death. The kidnapping effectuated without some forcible seizure, and therefore some bodily harm, must be the exception. We declare, therefore, for crediting Congress with intending the second inducement and preferring a cured and live victim to a dead or permanently injured one, even if the kidnappers must refrain from liberating until the cure is accomplished."

habeas corpus, as here, with the result that he was not retried until several years later, he would, under petitioner's construction, be subject to a lesser penalty on retrial for the same crime, if the victim recovers in the meantime.[12] Any person accused of kidnaping and injuring a person would thus have a powerful motive for attempting, by any means within his power, to delay as long as possible the trial of his case. We do not believe that Congress intended to make the imposition of the death sentence dependent upon the many factors which may result in an early or delayed trial.

Moreover, there is no reason to suppose that Congress intended to make a kidnaper the beneficiary of extraneous factors which may delay trial until long after the injured victim is liberated. Stated in another way, the purpose of the proviso is satisfied if it induces the kidnaper to hold unharmed and to liberate the victim. There is nothing to suggest that the Congress intended by the proviso to give the kidnaper the benefit of the period of time between liberation and imposition of sentence in which the victim might recover from injuries received. While this might persuade the kidnaper not to delay the release of the victim pending attempted cure this construction weakens the basic inducement not to harm the victim or neglect his

[12] The petitioner was sentenced on December 13, 1943, more than nine years after the kidnaped person was liberated on October 16, 1934.

injuries in reliance on the speculation that the victim will recover after liberation and before trial.

We submit that petitioner's construction is not in harmony with the grammatical structure and evident purpose of the proviso; that the condition of the victim at the time of his release is the factor which controls the application of the death penalty.

II

THE HARM WHICH THE PROVISO CONTEMPLATES IS NOT LIMITED TO PERMANENT INJURIES BUT INCLUDES INJURIES SUFFERED BY MRS. STOLL

Petitioner also contends that a victim who has suffered no permanent injury is an unharmed victim within the meaning of the statute. (Br. 13–16). This contention is apparently intended as an aid to his contention that the injuries must subsist at the time of trial and sentence. In his case the injuries would have had to subsist for nine years (footnote 12, *supra,* p. 20) and hence be more than temporary in character. Petitioner seeks support for his contention in the opinion of the district judge in the *Parker* case but, as has been indicated (*supra,* pp. 18–19), that judge was merely explaining that through the proviso Congress was holding out to the kidnaper the inducement to attempt to cure the victim and thus prevent his injuries from becoming permanent or causing his death.

a. There is no basis for a contention that the injuries must be permanent in character. Had Congress meant to provide that the death penalty should not be imposed if the kidnaped person were released without permanent injury, it would undoubtedly have said so by direct language as the Wisconsin Legislature had already done (*supra,* p. 15, footnote 7). Nor did Congress adopt the language of any of the State statutes which provide for a lesser punishment if the victim were alive (New York), "without serious bodily injury" (Texas), without "serious bodily harm" (West Virginia), or without "bodily harm" (California) (*supra,* p. 15).

"Harm" is a word of common usage with a well-defined meaning of "hurt" or "injury" (see Webster's New International Dictionary).[13] A person may be very seriously injured and may require years of treatment and yet may recover completely. Clearly, a person so injured in the course of a kidnaping is not liberated unharmed. Moreover, it is difficult to believe that Congress did not envisage, and by the proviso seek to prevent, injuries of the very dangerous type of those inflicted upon Mrs. Stoll—injuries of a character very likely to result from resistance to a forcible abduction.

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[13] Restatement of the Law of Torts, Vol. I, Sec. 7 (a) states that "'harm' implies the existence of a tangible and material detriment". Section 15 states that "bodily harm is any impairment of the physical condition of another's body or physical pain or illness."

In *Gooch* v. *United States,* 82 F. (2d) 534 (C. C. A. 10), a prosecution under the Kidnaping Act in which the death sentence was imposed, the injury to the victim's hip was caused by the breaking of a show-case glass during the initial fracas between Gooch's confederate and the kidnaped person. The evidence established that, after the victim's release, his wound was dressed and closed with four stitches; there apparently was no evidence of permanent injury (82 F. (2d) at p. 536). This Court denied certiorari (298 U. S. 658) as against the contention of the petition for certiorari that the statute did not apply to injuries incidentally inflicted or to injuries of such trivial character (see petition for certiorari, No. 883, October Term, 1935, p. 19).[14]

b. There may be, of course, situations in which a particular injury is of so slight a character that there is a question as to whether it amounts to harm within the meaning of the proviso. This is not such a case. Here the evidence discloses that petitioner twice forcibly struck Mrs. Stoll over the head with an iron pipe to subdue her, that she was still suffering from these injuries when she was released six days later, that in addition her lips were raw and bleeding as a result of the adhesive tape which had been applied to them, and that she

[14] Previously this Court on certificate had construed another portion of the statute (297 U. S. 124).

was in a state of nervous exhaustion and tension (see Statement, *supra*, pp. 7–9). Petitioner cannot complain because in some other situation there may be a question whether some other type of injury amounts to harm. Cf. *United States* v. *Classic*, 313 U. S. 299, 324–325.

The words "liberated unharmed" were properly defined by the trial judge in submitting to the jury for their determination the issue as to whether they should recommend the death penalty (see *supra*, pp. 9–10). The evidence amply supports the verdict that petitioner's victim was not liberated unharmed.

The supplemental brief for the petitioner (pp. 1–5) states that any injuries committed in the course of the seizure prior to the transportation of the victim cannot be used as a basis for the imposition of the death sentence. This question may not be within Question 5(d) of the petition for certiorari which this Court agreed to review when read in connection with Point No. 1 of the petition for rehearing, particularly since Question 10 of the petition specifically dealt with this point (p. 26), was separately answered in the brief in opposition (pp. 22–23), and review of this question was not granted. In any event, the Government submits that there is no merit in this contention for the reasons stated in its brief in opposition (pp. 22–23) and in *Gooch* v. *United States*, 82 F. (2d) 534,

536, 537–538 (C. C. A. 10). The petition for a writ of certiorari in the *Gooch* case, which urged this point, was denied, 298 U. S. 658.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of conviction should be affirmed.

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